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No. 75-882

In the Supreme Court of the United States

OCTOBER TERM, 1975

PATRICIA S. SPLAWN, PETITIONER

v.

CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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Petitioner Patricia Splawn respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal for the Second Appellate District, Division Five, entered on July 31, 1975 (hearing denied by the Supreme Court of California on September 24, 1975).

OPINION BELOW

The opinion of the California Court of Appeal is unreported. A copy thereof is reproduced here as Appendix B to this petition, *infra* pp. 7A *et seq*. The California Supreme Court in denying hearing rendered no opinion.

JURISDICTION

This court has federal question jurisdiction on certiorari under 28 U.S.C. § 1257(3), since petitioner claims here and claimed below rights based on the United States Constitution, in particular the fourth and fourteenth amendments. This petition has been filed within 90 days (see 28 U.S.C. § 2101(d); Rule 22(1), United States Supreme Court Rules) of the denial of hearing by the Supreme Court of California on September 24, 1975, at which time petitioner exhausted review at the state court level.

QUESTIONS PRESENTED

1. Whether under the fourth and fourteenth amendments an affidavit for search warrant is inadequate (and the subsequent search and seizure under warrant unreasonable) when for no cause the affidavit is written so it is impossible to tell if the critical incriminating data was supplied by an unreliable informant—so that corroboration was needed—or by one who was not an informant.

2. Whether there is any rational basis under the equal protection clause of the fourteenth amendment for (or whether due process is violated by) California's system of criminal procedure under which most defendants—those

prosecuted by information—have the privilege of examining under oath before trial key prosecution witnesses but a small minority of defendants, selected arbitrarily by the district attorney for prosecution by indictment, are denied such a benefit.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The fourteenth amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE[1]

This case arises out of efforts by the police in Oxnard, California, to break an unusual drug supply operation—

[1] The clerk's and reporter's transcripts in this case are voluminous. To avoid unnecessary burden on the Court, petitioner has not elected at this time to lodge these transcripts with the Court, as permitted by Rule 12(1), United States Supreme Court Rules. However, where required by Rule 23(1)(f) and in other portions of the petition for the Court's convenience in the event it requests petitioner to transmit the record, citations to the Clerk's Transcript ("C.T.") and Reporter's Transcript ("R.T.") are given.

the sellers, instead of delivering the illegal drug, supplied a map which would lead the buyer to a concealed cache of contraband.

Petitioner became a suspect when a concededly untested, unreliable informant, known in this proceeding as "CI" (for *C*onfidential *I*nformant) until her identity as Barbara Bird was revealed, told police she had been buying heroin from petitioner. See p. 5A, *infra*. Police sought to corroborate this tip by having CI buy some heroin "maps" from petitioner with pre-recorded police money. It was decided CI would use as an intermediary in making the purchases Nancy Muller, a heroin addict and sometime seller of drugs. R.T. 78, 81, 116. CI and Muller met; Muller drove to petitioner's house; and subsequently CI produced for the police heroin maps and illegal drugs which were obtained by following directions on the maps.

Police then sought and obtained a warrant authorizing them to search petitioner's home for drug maps and other incriminating items. The State claims that the affidavit for search warrant, which is analyzed in detail at pp. 10-13, *infra*, offers corroboration of CI's accusations in the form of statements of Nancy Muller overheard by police. Petitioner has contended throughout this case that the affidavit does not disclose anything said by the allegedly corroborating Muller.

The search of petitioner's home turned up some heroin maps (not, however, in petitioner's handwriting, R.T. 514), some records of drug sale transactions, some of the police's pre-recorded money, and some paraphernalia used by drug traffickers. Petitioner, if believed, had an exonerating explanation for the presence of these items in her house.

Petitioner was arrested on felony charges of violating California drug laws. Charges against her were originally made by the district attorney's filing of an information. A preliminary hearing was scheduled, at which the key witnesses against petitioner, Nancy Muller and Barbara Bird

(CI), were to testify. This hearing was twice delayed. Finally, when the time for the preliminary hearing arrived, the prosecutor appeared in court with an indictment that had recently—unbeknownst to petitioner or the preliminary hearing judge—been returned against petitioner after the grand jury in secret session had heard Muller and Bird testify. The Municipal Court then cancelled the preliminary hearing, since under California law a defendant prosecuted by indictment is denied that procedural benefit.

During pretrial proceedings in Superior Court, petitioner moved to suppress as evidence against her all of the items seized in the aforesaid warrant-based search of her home. C.T. 46. The grounds stated were violation of the fourth amendment of the United States Constitution, specifically, inadequacy of the affidavit for search warrant under *Aguilar v. Texas*, 378 U.S. 108 (1964). C.T. 47. The motion was denied as to numerous items of evidence. Supp. R.T. 133. Petitioner also moved the trial court to permit petitioner to take the deposition of Muller or in lieu thereof to conduct a post-indictment preliminary hearing. C.T. 14-41. In view of California appellate court cases binding on the trial judge,[2] petitioner urged only that the trial court in its discretion had the power to order a deposition. Petitioner did note that the need of a litigant for the taking of an adverse witness's deposition "is surely as great where life and liberty are at stake as where financial and property interests are involved." C.T. 21. The motion was denied.

At trial, the damaging evidence against petitioner was of two types: (1) the items obtained upon search of her home; (2) the testimony of Nancy Muller that she had purchased heroin maps from petitioner. Muller testified

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[2] For example, *Clark v. Superior Court*, 190 Cal.App.2d 739, 12 Cal. Rptr. 191 (1961), had held that a defendant could not as a matter of right take the deposition of prosecution witnesses. See also *People v. Mersino*, 237 Cal.App.2d 265, 269, 46 Cal. Rptr. 821, 824 (1965).

under a grant of immunity (R.T. 78), and various criminal charges against Muller were kept pending until petitioner was convicted. Muller had, as noted, testified under examination by the prosecuting attorney in secret session before the grand jury. Gr. Jur. R.T. 15 *et seq*. The only pretrial record of Muller's position on the issues involved at trial was this grand jury testimony untested by cross examination. It seems obvious that because of her immunity grant, Muller was under pressure not to depart from that one-sided grand jury testimony.

Petitioner was convicted of sale of heroin (two counts), conspiracy to sell heroin, and maintaining a place where heroin was sold. On appeal to the California Court of Appeal for the Second Appellate District (Division Five), petitioner pursued both her arguments concerning the unconstitutionality of the search and seizure and the denial of her request to take the deposition of Muller or to have a preliminary hearing. On the fourth amendment issue, *Aguilar v. Texas* remained the focus of petitioner's claim. App. Op. Br. 15, 18, 22, 27, 30, 77. On the other issue, petitioner's brief in the Court of Appeal specifically contended that due process and equal protection were denied by the prosecution's device of shifting her out of the prosecution-by-information track of California procedure, where the preliminary hearing assures a pretrial opportunity to cross examine key State's witnesses under oath, to the prosecution-by-indictment track, where such benefits are denied. App. Op. Br. 44-52. Because of precedents binding on California's intermediate appellate court,[3] petitioner could not contend before the Court of Appeal that

[3] The California Supreme Court had in *People v. Sirhan*, 7 Cal. 3d 710, 746-47, 497 P.2d 1121, 1145-1146, 102 Cal. Rptr. 385, 409-410 (1972), rejected the argument made here that the denial of procedural benefits to indictees that were given to other defendants made the prosecution-by-indictment track unconstitutional. Such a state Supreme Court decision is "binding upon and must be followed by the intermediate state appellate court." *Arts Equity*

the procedure in the prosecution-by-indictment track was itself unconstitutional.

It was perfectly clear to the State, however, that petitioner considered California's prosecution-by-indictment procedures to offend the United States Constitution. The People extensively argued the constitutionality of such procedures in a portion of their Court of Appeal brief captioned: "III. THE GRAND JURY INDICTMENT PROCEDURE WAS CONSTITUTIONAL." Resp. Br. p. 42. The intermediate appellate court simply held, as it had to (see footnote 3, *supra*), that petitioner had no right to take Muller's deposition. See pp. 18A-19A, *infra*.

On the fourth amendment question, the state Court of Appeal apparently held that the affidavit did contain corroboration of the untested informant's charges by way of comments of Nancy Muller heard by the police. Alternatively, the Court said that, assuming Muller had not been heard to say anything, what the police *saw* was sufficient corroboration. P. 9A, *infra*.

Upon petition for hearing to the state Supreme Court, petitioner was for the first time entitled under state stare decisis rules (see footnote 3, *supra*), to ask for a holding that denying to indictees procedural benefits accorded other criminal defendants was unconstitutional. Freed from stare decisis constraints, petitioner contended to the state Supreme Court that there was no reason whatsoever to discriminate against indictees and deny them the right to cross examine key prosecution witnesses under oath before trial, as other defendants are entitled to do at their preliminary

Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455, 369 P.2d 937, 940, 20 Cal. Rptr. 321, 324 (1962).

Since petitioner followed prescribed state procedures in reserving until the state Supreme Court level her attack on *Sirhan*, that Court would have considered petitioner's federal questions had hearing been granted. Accordingly, such questions are properly before this court. *Cf. Capital City Drug Co. v. Ohio*, 183 U.S. 238 (1902).

hearings. Petn. for Hearing pp. 10-13. That court denied hearing without opinion.

REASONS FOR GRANTING THE WRIT

I. BECAUSE OF AMBIGUITY CAUSED BY THE POLICE THAT COULD READILY HAVE BEEN AVOIDED, THE AFFIDAVIT FOR SEARCH WARRANT LACKED THE CORROBORATION OF ACCUSATIONS MADE BY AN UNRELIABLE INFORMANT THAT IS REQUIRED BY THE FOURTH AND FOURTEENTH AMENDMENTS

The first issue in the case concerns procedures for safeguarding rights accorded by the fourth and fourteenth amendments against unreasonable searches—specifically, the sufficiency of an affidavit filed as the basis for issuance of a search warrant.

The Court has established that a warrant may not issue on the basis solely of data supplied by an untested informant. Corroboration of some sort is required before the serious intrusion involved in a search of one's home will be authorized. *E.g., Recznik v. City of Lorain,* 393 U.S. 166, 169 (1968) ("police must show a basis for the search beyond the mere fact of an assertion by an informer"); *Aguilar v. Texas* 378 U.S. 108 (1964).

In the present case, *how much* corroboration is needed is not the main issue. We have no quarrel with the State's contention that, if police overheard drug dealer Nancy Muller declaring that she got her herion from petitioner, information against petitioner supplied by the untested CI was sufficiently corroborated to support a warrant to search petitioner's house.

The issue, rather, is the *manner* in which the affidavit sets forth the constitutionally required corroboration. We contend that an affidavit is constitutionally insufficient when it does not disclose whether the asserted corroboration

was independently obtained by the police or was actually just more data supplied by the informant. This Court has never considered this problem. It has provided general guidelines with respect to interpretation of an affidavit for search warrant in *United States vs. Ventresca,* 380 U.S. 102, 108 (1965):

> "[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Applying this test the Court in *Ventresca* reversed a judgment that had found an affidavit inadequate on the theory that an assertion that some information recited in the affidavit came from I.R.S. investigators might be concealing the fact that such federal agents had, themselves, obtained their data from untested informants. The *Ventresca* holding is certainly sound, as is the policy behind it favoring use of the warrant procedure. We urge, however, that *Ventresca* does not enable the State to find the constitutionally required corroboration wholly in dubious inferences that the State is forced to draw because of poor draftsmanship of the affidavit.

A. *Courts and magistrates should not cure sloppily drafted affidavits by making dubious inferences when the affiant police officer could easily lay out the plain facts.*

The probable-cause portion of the affidavit in this case[4] begins by introducing CI (for "Confidential Informant"). It states that CI was of "unknown, untested reliability." CI was awaiting sentencing on a petty theft conviction and parole revocation arising out of yet another misdemeanor conviction. (*Infra* p. 2A lines 21-27.) CI told the police she had had dealings in heroin with petitioner, Patricia Splawn. (P. 5A lines 15-20.)

On March 20, 1974, the police affiant, officer Dunham, met with CI to arrange a "buy" of heroin from petitioner to corroborate CI's tale. CI was to make her buy through Nancy Muller. (P. 2A lines 28-35, 3A lines 1-2.) The affidavit notes that "the CI placed a recorded telephone call to Nancy Muller who agreed to meet the CI. Your affiant has listened to the tape recording of that call." (P. 2A lines 34-35, 3A lines 1-2). The affidavit never tells us, however, *anything* that officer Dunham heard Nancy Muller say. As we shall see, the affidavit suffers from this shortcoming every time Dunham speaks of listening in on Muller's statements, so that they never appear as a corroborating source for CI.

The police then gave CI money, wired CI for sound so they could listen in on her conversations with Muller, and sent CI off to her rendezvous. The two women met. The affidavit says that, "Your affiant monitored and recorded the conversation between Muller and the CI . . . ."[5] (P. 3A

[4] The original hand-printed affidavit appears at pages 94-103 of the clerk's transcript. The prosecution agreed below that a typed reproduction of the affidavit appearing in an appendix to petitioner's Opening Brief in the California Court of Appeal (cited hereinafter as App. Op. Br.) was accurate. Respondent's Brief in the California Court of Appeal at 20 n. 10 (cited hereinafter as Resp. Br.). We have reproduced that appendix at pages 1A-6A, *infra,* of this petition for certiorari.

[5] The omitted portion of this sentence is: ". . . as he had done with a conversation the preceding day [i.e., March 19] when Muller agreed to sell the CI heroin on March 20." (P. 3A lines 15-17.) This

lines 13-15.) But officer Dunham never tells us anything that was said. The affidavit then asserts that CI at this time gave Muller the money for the buy—"marked" [serial numbers pre-recorded] bills—supplied by the police. (P. 3A lines 6-7, 18.) But how did Dunham learn this fact? Because Muller acknowledged receipt of the money in the conversation overheard by police? The State would like to have that inference drawn, to bring in Muller as a corroborative source. But that would be an absurd inference. The affidavit says "CI gave Nancy Muller $225 in recorded funds." (P. 3A lines 6-7.) Apparently the magistrate is to infer that Nancy Muller said to CI, the police listening in: "Thank you for the $225 in marked bills." Obviously it is far more likely that officer Dunham learned of the passing of the marked bills from CI when she was taken back into custody (p. 4A lines 14-16) after the "buy."

The affidavit then says that the police watched Muller leave her house (with CI remaining there) and drive to petitioner's residence. Whether Muller actually entered petitioner's house or even left her car—which was parked there about a half hour—police could not see. (P. 3A lines 18-31.) Muller then drove back to her own house, Muller honked her horn, and CI got into her car. (P. 3A lines 32-35, 4A lines 1-2.)

Then, says the affidavit, "CI and Muller discussed a map Muller had obtained at the Ventura Boulevard address[6] which showed where the heroin was located." (P. 4A lines 2-4.) This is one of two critical passages in the affidavit where the State's case of corroboration demands that the magistrate and the courts infer that the source of

is the only hint in the affidavit of activity involving CI, Muller, and the police on March *19*. Assuming Dunham did hear Muller talk of heroin on the 19th, that does not corroborate CI's accusations against *petitioner* in any way.

[6] The reference here is to 1761 Ventura Boulevard, the address of petitioner's home listed at the outset of the affidavit (p. 1A, line 3) as the premises for which the police sought a warrant for search.

officer Dunham's information was his listening in—by means of the police's bugging equipment—on the Muller-CI conversation and hearing Muller declare this information linking petitioner's house to a heroin buy. Muller, says the State's brief below, was the "obvious source" of this critical, damaging information against petitioner. (Resp. Br. at 31.) Again, the State must rely on the drawing of a foolish inference. If Muller was out on a heroin buy, as contended, why did she leave CI at home if not to keep her source secret?[7] Can one actually imagine Muller saying to CI when CI got into the car: "Well, I've just come from 1761 Ventura Boulevard and I got there a map to some heroin"? Obviously it is far more likely that officer Dunham's source for the damaging above-quoted passage from the affidavit was the unreliable CI, discussing her activities with Muller after returning to police custody.

After stating that the heroin map was obtained at petitioner's residence, the affidavit goes on to relate how CI and Muller were able to locate a hidden heroin cache, which CI gave to the police (p. 4A lines 5-22).

The next day a similar "buy" was staged. CI twice telephoned Muller. Dunham's affidavit says the calls that day were "recorded" and that he was "present when the calls were made." (P. 4A line 34, 5A lines 1-2.) If anything damaging to petitioner was said by Muller during the conversations, the affidavit is completely silent about it.

Muller and CI again met. Again, according to the affidavit, CI gave Muller marked bills. (P. 5A line 6.) How

[7] Faced with explaining this in the courts below, the State came up with the theory that Muller left CI at home not to conceal from CI where Muller was going but so that the heroin seller—allegedly petitioner Splawn—would not see CI. Yet, according the State's theory, CI is to be believed when CI says she had numerous "prior dealings" in heroin with defendant before this "buy." (See p. 5A lines 18-19.) Thus, on the State's theory of the case, there would be no reason for Muller twice (see p. 13, *infra*) to keep CI from seeing where Muller was driving.

officer Dunham knew this is once again not revealed. As with the first "buy," it is so improbable that Muller orally acknowledged receiving marked bills that the information must have come from the unreliable CI. As with the first buy, Muller again drove to petitioner's home, leaving CI behind and waiting for Muller two miles away so that CI could not know where Muller was going. (P. 5A lines 24-26.)

The second critical passage of the affidavit now appears. It is highly incriminating of petitioner (whose name is "Patty") and, if a statement by Muller overheard by police is the source of this passage, it must be conceded that there was sufficient corroboration of CI's charges:

> During conversations on March 20, 1974, between the CI and Nancy Muller, Muller indicated she was buying the heroin from a "Patty" on the above described premises. [P. 5A lines 15-18.]

With respect to this passage, the State argued below (Resp. Br. 27-28):

> [T]he affiant was able to personally overhear conversations between Muller and the CI and establish that the CI in fact gave Muller the recorded currency, that Muller, agreed to sell heroin, that Muller was obtaining the heroin or the maps from 'Patty' and that the maps had been obtained from appellant's residence.

The affidavit obviously does not say that Dunham obtained this information by listening in on Muller's statements, rather than from what CI said about them when CI was taken back into custody. Obviously, too, the State must have the magistrate and courts draw the inference made in the quoted passage above from the State's brief—that in fact officer Dunham heard all this by listening in on the CI-Muller conversations. We have already noted how pre-

posterous it is to think Muller would state her awareness that she was being given "recorded currency." Likewise an untenable inference is that Muller—having twice taken pains to assure that CI could not see where Muller was driving to obtain a "map"—announced to CI that "Patty" and 1761 Ventura Boulevard were Muller's source.

The points we wish to stress are (1) that the inferences favorable to petitioner are more reasonable than those that are unfavorable and certainly do not rest on any tortured construction of the affidavit as prohibited by *Ventresca*;[8] and (2) that officer Dunham with the greatest of ease could have eliminated any need to speculate as to inferences by stating in the affidavit: "I hear Muller say to CI . . . [*e.g.*, "Thank you for the $225 in marked currency"] . . . ."

This court has never considered an affidavit anything like officer Dunham's. In *Ventresca,* the affidavit was crystal clear in stating that the source of information was data supplied by I.R.S. investigators. 380 U.S. at 104 and 112. In *Aguilar v. Texas,* 378 U.S. 108, 109 (1964), the information was from a "credible person." The problem was there was no corroboration or explanation of credibility. In *Jones v. United States,* 362 U.S. 257, 267 n. 4 (1962), the affidavit was unambiguous in indicating what data came from a reliable "source," what was the corroborating information that the affiant officer himself observed, and that it was "other officers of the narcotic squad" and not some unreliable tipster that had supplied other corroborating data. And in *Spinelli v. United States,* 393 U.S. 410, 420-

[8] The rule of *Ventresca* is that the magistrate and courts must take a "commonsense" rather than "grudging or negative" approach to construing such affidavits. The lower court was reversed there because "Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." 380 U.S. at 108.

422 (1969),[9] the affidavit was a model of clarity in stating the source of data there laid out. In fact, the *Spinelli* affidavit is strong evidence of how easily a police officer can distinguish in his affidavit what he observed from what other persons reported to him.

The lower courts have, however, encountered a similar problem and have held that *Ventresca* was not intended to approve affidavits ambiguous on critical issues where the police could avoid the ambiguity. The leading case is *Rosencranz v. United States,* 356 F.2d 310 (1st Cir. 1966); accord, *United States v. Boyd,* 422 F.2d 791 (6th Cir. 1970), and *Saville v. O'Brien,* 420 F.2d 347 (1st Cir. 1969). In *Rosencranz,* the affidavit reported an anonymous tip that an illegal still was in operation and the corroboration: the treasury department affiant's own sniffing a strong odor of mash from the building where the still allegedly was. The affidavit was silent as to when the tip was received and when the whiff of mash obtained. Since stale information will not support a warrant, the prosecution argued that under *Ventresca* a statement in the affidavit that "the facts tending to establish the foregoing grounds for issuance of a Search Warrant *are* as follows" (356 F.2d 312 n. 1) (emphasis added)), raised an inference from the use of the present tense that the information was current—so current that the affiant believed the conditions still existed as he had smelled them.

The Court of Appeal, noting that there were additional bases in the affidavit for inferring that the information was current, nevertheless reversed. If the *Rosencranz* affidavit were held sufficient, said the court,

[9] Petitioner does *not* rely on the *Spinelli* holding concerning the *amount* of corroboration required, which at least one member of the Court would overrule. *United States v. Harris,* 403 U.S. 573, 586 (1971) (Blackmun, J., concurring).

[o]fficers with information of questionable recency could escape embarrassment by simply omitting averments as to time, so long as they reported that whatever information they received was stated to be current at that time. Magistrates would have less opportunity to perform their 'natural [neutral?] and detached' function. Indeed, if the affidavit in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for them.

. . .

It is one thing to expect the magistrate to give a commonsense reading to the facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed.

If the magistrate must observe certain minimum requirements, so must the officer-affiant. He must set forth the basis for the magistrate's inferences with enough precision so that, if the affiant is subjected to an attack for lack of probable cause at a subsequent hearing, the trial judge will be ruling on reasonableness of inferences based on the same underlying circumstances as confronted the commissioner. . . .

With a small amendment, both magistrate and officer could have remedied the defect in this case. We see no policy served which would relieve them of this minimal burden. . . .

We do not think this is being hypertechnical, legalistic, or insistent on a requirement of 'elaborate specificity once executed by common law pleadings.' Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement. [356 F.2d at 316-18.]

Likewise the police are surely well aware of the *Aguilar* requirement that an untested informant's charges must be corroborated. Just as the affidavit in *Rosencranz* could easily have indicated "when," in our case officer Dunham could easily have indicated "who." The *Rosencranz* court thought a rule requiring the "when" to appear specifically would serve law enforcement by reducing the amount of court litigation on sufficiency of affidavits for search warrant. *Id.* at 317. Precisely the same is true of a rule requiring some specificity in stating "who" is the source of asserted corroborative facts.

To follow *Rosencranz* in the present case will not burden the police. It will, on the other hand, assure that police do not rummage about persons' homes under warrants obtained on the basis of fantastic inferences. The fourth amendment would be well served by granting certiorari in this case.

B. *Attributing the Incriminating Information About Petitioner to the Untested Informant, There Was Clearly Insufficient Corroboration.*

The California Court of Appeal initially held (P. 9A, *infra*) that statements by Muller corroborated the tip from CI, noting that "Muller was a participant in a crime and her statements were entitled to more weight than those of a mere tipster." If this Court agrees that it cannot reasonably be inferred that the police heard Muller make statements incriminating petitioner, the lower court's alternative holding must be considered:

> The magistrate could properly have issued the warrant if Muller had said nothing and the warrant had been issued based on the officer's observations. . . . [T]he almost inescapable inference is that Muller,

> after having arranged to obtain heroin for the informant, went to defendant's residence to pay for the heroin and to obtain the map that would lead to it [P. 9A-10A.]

The only police "observation" to corroborate CI's accusations that petitioner sold the heroin maps to CI and Muller was Muller's appearance at petitioner's house in this time sequence: (1) CI said she'd get some heroin from petitioner; (2) CI talked to Muller; (3) Muller drove to petitioner's house but was not seen to enter it; (4) later CI produced the heroin. We submit that to have someone drive up to your house and inferentially visit you for half an hour is perfectly innocent activity in no way corroborating a charge that you deal in heroin. What the police "observed" showed only that CI said something to Muller to cause her to go to petitioner's house. Heroin-trafficker Muller's own house or car remained the apparent source of the heroin CI produced. Thus, it is obvious why the State contended so strongly below that officer Dunham heard Muller, not CI, say that the heroin maps came from petitioner. Without this, petitioner's involvement is totally innocent but for the accusations of the unreliable CI.

C. *The Fact that CI's Statements to Police Were Against CI's Penal Interest Is Not Sufficient Corroboration.*

In *Harris v. United States,* 403 U.S. 573 (1971), an anonymous tipster admitted to having bought untaxed moonshine whiskey from the defendant. The tip was corroborated by the affiant officer's own knowledge of the defendant's reputation as moonshiner. 403 U.S. at 582-583. Four justices of the Court found "an additional reason" for crediting the tip in that it was against the informant's penal interest. 403 U.S. at 583. People "do not lightly admit a crime," noted the plurality. *Id.*

In our case, CI's charges against petitioner included an admission by CI that she had purchased and possessed heroin. However, the facts of our case are very different from *Harris*—the admission by CI is only technically against penal interest and was obviously calculated to help CI with the law. In *Harris,* the affidavit suggested no benefit at all to the tipster by his admitting many illegal purchases. There is no suggestion he had already been charged with crime or was a suspect—merely that he feared for his life should his name be revealed. 403 U.S. at 575. For all it appears the *Harris* tipster would have stayed out of trouble had he kept his mouth shut. In our case, the affidavit disclosed CI was awaiting sentencing on a theft conviction and probation revocation on another misdemeanor conviction. (P. 2A lines 23-26). Dunham said no promises had been made to CI (*id,* lines 26-27), but it seems obvious that CI was cooperating with the police in hopes that she would be treated leniently. She could also reasonably expect an immunity grant if she subsequently testified against petitioner at a trial. In fact, CI, Barbara Bird, was given immunity when she testified against petitioner at trial. R.T. 34-35.

Moreover, the State itself took the position below that Bird's cooperation with the police was really not against her interest: ". . . her principal motivation for assisting the police [she testified] lay in her desire to overcome her heroin addiction. She reasoned that if it was known that she was a police informant no one would sell heroin to her in Ventura County." Resp. Br. 3 n. 2. We urge that the State cannot now contend that Bird's statements to police were so against her penal interest as to dispense with the need for corroboration.

D. *The* Aguilar *Error Was Prejudicial.*

As the State noted below, "many items of evidence" seized during the search under warrant were admitted

against petitioner at trial. (Resp. Br. 11). These included a ledger kept by petitioner showing narcotics transactions; and balloons, a scale, and a funnel which, experts testified, were commonly used to package heroin for sale. In addition, some of the marked bills the police gave to CI to make her "buy" were found under the mattress of petitioner's bed. (See p. 16A, *infra.*) The only other significant incriminating evidence was the testimony of Muller, given under a grant of immunity. Petitioner presented alibi witnesses who had no reason to lie for her. It is probable that the jury believed Muller rather than petitioner and her witnesses only because the items taken during the search tended to back up Muller's story of purchasing heroin maps from petitioner.

II. THE FOURTEENTH AMENDMENT IS VIOLATED BY A CRIMINAL PROCEDURE SYSTEM THAT DENIES THE ACCUSED OPPORTUNITY TO EXAMINE UNDER OATH BEFORE TRIAL KEY WITNESSES AGAINST HIM, AT LEAST WHERE MOST DEFENDANTS ARE GIVEN SUCH A RIGHT.

A. *Equal Protection is Denied Because There is No Reasonable Justification For Denying Pre-trial Examination of Witnesses to the Four Percent of California's Defendants Chosen in the Unfettered Discretion of the District Attorney for Prosecution by Indictment.*

California law empowers a district attorney to prosecute criminally either by seeking an indictment from a grand jury or by filing an information. CALIF. CONST. art. I, § 14 (West 1954); CALIF. PEN. CODE § 737 (West 1970). As Justice Mosk of the California Supreme Court (a former attorney general of the state) recently observed, "The choice, with no guiding standards in either statute or case

law, is subject to the uninhibited whims of the district attorney." *Johnson v. Superior Court,* ..... Cal.3d ....., ..., 124 Cal. Rptr. 32, 37, 539 P.2d 792, 797 (1975) (concurring opinion); accord, Alexander and Portman, Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue, 25 HASTINGS L.J. 997, 1009-1010 (1974). When prosecution is by information, California assures the defendant a preliminary hearing, at which the witnesses relied on to establish probable cause of defendant's guilt "must be examined in the presence of the defendant, and may be cross-examined in his behalf." CALIF. PEN. CODE § 865 (West 1970). In addition, if the State does not call those witnesses which the accused wishes to examine under oath at this pretrial stage of the proceedings, the defendant may call witnesses, and "any witnesses the defendant may produce must be sworn and examined." CALIF. PEN. CODE § 866 (West 1970). The testimony is prepared by a court reporter like a deposition. CALIF PEN. CODE § 869 (West 1970). The procedure is considered by defense counsel as a valuable discovery tool, see *Blue v. United States,* 342 F.2d 894, 899 (D.C. Cir. 1964) *cert. den.* 380 U.S. 944 (1964); Anderson, The Preliminary Hearing —Better Alternatives or More of the Same? 35 MO. L. REV. 281, 292 (1970); and, of course, the transcript can be used subsequently at trial to impeach a witness against the defendant or refresh his or her recollection. See CALIF. EVID. CODE §§ 780(h), 785, 791, 771.

When, however, prosecution follows an indictment by a grand jury, the benefit of pretrial examination of prosecution witnesses under oath is denied the accused, as occurred in the case of petitioner Splawn. There is no preliminary hearing, and, as held by the state Court of Appeal in this case (pp. 18A-19A, *infra*), a "defendant has no particular right to take the deposition of any witness, notwithstanding Code of Civil Procedure section 2016" that confers

such a right on a party in a civil suit. Accord, *People v. Mersino,* 237 Cal.App.2d 265, 269, 46 Cal. Rptr. 821, 824 (1965).

The indictee, like petitioner, may be given a copy of the testimony before the grand jury, but grand jury sessions are held in secret. CALIF. PEN. CODE §§ 939, 915, 924, 924.2 (West 1970). Neither the accused nor his counsel is permitted to be present. The questions of the witness are asked by the state's prosecuting attorney, see CALIF. PEN. CODE § 935, and, needless to say, will be calculated to bring out damaging information against the accused. There is no cross examination.[10]

Without doubt, the 4.1 percent of California defendants (see *Johnson v. Superior Court, supra,* 124 Cal. Rptr. at 46, 539 P.2d at 806 (Mosk, J. concurring)) arbitrarily selected for prosecution by indictment are deprived of very valuable procedural benefits. Denial of petitioner's motion to take the deposition of or otherwise examine Nancy Muller put the defense at a real disadvantage which petitioner would not have suffered had she not been prosecuted by indictment. Ms. Muller testified for the State under a grant of immunity and obviously must have felt under pressure not to depart from her grand jury testimony that was developed by a prosecutor's questioning without any testing under cross examination. Moreover, petitioner was denied the chance to "pin down" the key prosecution witness well

[10] Defense counsel may also be permitted to talk to prosecution witnesses (see C.T. 145, where the trial court allowed counsel to meet with Nancy Muller). However, the witness cannot be compelled to answer questions, *Walker v. Superior Court,* 155 Cal.App. 2d 134, 317 P.2d 130, 134 (1957). And, of course, at a mere interview the witness is not placed under oath and no court reporter takes down what is said. Moreover, it has been noted, the interview procedure risks creating the appearance that defense counsel has suborned perjury, if anything favorable to the accused emerges out of it. J. Demeo, California Deposition and Discovery Practice ¶ 16.03(2) at 106 (1971).

before trial—a right the 95.9 percent of California defendants proceeded against by information do enjoy.

In determining whether denial to a class of defendants of a benefit of criminal procedure law generally accorded an accused violates the equal protection clause, this Court has previously required the state to show a "reasonable justification" for such fickle application of the law. *Jackson v. Indiana,* 406 U.S. 715, 729 (1972); see also *Baxtrom v. Herold,* 383 U.S. 107, 111 (1966) (distinction must have "some relevance" to purpose of making a classification); *Marshall v. United States,* 414 U.S. 417, 422 (1974) ("rationale basis" test used in Fifth Amendment equal protection case).[11]

In *Johnson v. Superior Court, supra,* the concurring opinion of Justice Mosk that exhaustively considered the problem presented here was able to find *no reason at all* for denying to indictees the benefits of a preliminary hearing enjoyed by most California criminal defendants:

> One class of defendants receives a preliminary hearing with the attendant rights heretofore enumerated, while the other class receives no preliminary hearing and no procedural protections. . . . The classification is not based on any state objective which may be considered legitimate, but rather is grounded on the arbitrary goal of vesting in the People vast

[11] For purposes of this petition we assume that "reasonable justification" under *Jackson* is the appropriate equal protection standard. In the event certiorari is granted, we should like to reserve the argument that, since liberty and fundamental rights are at issue, California should be required to show a "compelling state interest" for denying indictees pretrial discovery benefits generally accorded to defendants. This is the view of Justice Mosk, *Johnson v. Superior Court, supra,* 124 Cal. Rptr. at 43, 539 P.2d at 803 (concurring opinion); see also *People v. Duncan,* 388 Mich. 489, 201 N.W.2d 629, 635 (1972) ("serious question" whether similar Michigan scheme abandoned there by the court denied "fundamental right").

> prosecutorial advantages which the grand jury system affords. [124 Cal. Rptr. at 43, 539 P.2d at 803.]

In the instant case, the State in answering petitioner's equal protection contentions below, could find no *reason* for denying petitioner's motion to take the deposition or otherwise examine Nancy Muller prior to trial.[12] Its only attempted *justification* is as follows:

> [I]n weighing these two procedures, the benefits of a preliminary examination [*e.g.*, confrontation of witnesses] must be balanced against the benefits to the defendant which are derived through lack of public accusation. [Resp. Br. 50.]

In other words, a quid pro quo argument: for the "benefit" of a secret hearing, Star Chamber style, to determine probable cause, the accused forfeits pretrial examination under oath of adverse witnesses. The State's *ipse dixit* making secrecy of criminal proceedings a "benefit" to the accused is somewhat remarkable in view of the Sixth Amendment's guaranteeing a "public" trial as one of the accused's fundamental rights. Actually, the consensus is that grand jury secrecy is very much a detriment to the accused. Exposed only to the prosecuting attorney, the grand jurors must rely on him and become virtually his lackey, rubber stamping his prosecutorial decision to initiate a criminal trial by indictment. *E.g.*, Alexander and Portman, Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue, 25 HASTINGS L. J. 997 (1974) (noting at 1004 n. 53 statistics showing that grand juries return a true bill in 94.1% of the cases presented to them while magistrates at preliminary hearing bind over for trial at a 90% rate). Secrecy of grand

[12] The State itself said below: "There is no indication in the record why the prosecution elected to seek a grand jury indictment after the felony complaint had been filed." Resp. Br. 44.

jury proceedings is *not* a benefit to the accused because it means he is not represented by counsel and a one-sided case is presented. This further defect in the State's prosecution-by-indictment procedure is certainly not a "reasonable justification" for denying pretrial examination under oath of adverse witnesses.

The *actual* reasons why a district attorney elects to prosecute by indictment, thereby cutting back on an accused's procedural protections, were revealed in a 1963 survey of district attorneys in Northern California. They included such bases as "political reasons" because of great public interest in a crime, ability to use grand jury investigative powers, and ability to commence a prosecution although the accused was out of state. Comment, The California Grand Jury—Two Current Problems, 52 CALIF. L. REV. 116, 118 (1964). These are not even related to the question why an indictee should subsequently in pretrial proceedings be denied discovery benefits enjoyed by most criminal defendants. The survey also found that prosecutors used the indictment procedure "when the district attorney desires to avoid premature cross-examination of emotional or reluctant witnesses." *Id.* We submit that to turn the availability of examination under oath on a witness' purported "reluctance" or "emotional" state is to employ no standard at all. Moreover, even if the "reluctance" standard *were* reasonable, the court, and not the prosecutor, an adversary in the case, is the appropriate official to apply the test.

A holding that California cannot justify the present discrimination in its law will not thrust this court again into the business of writing criminal procedure codes for the states. The appropriate disposition would be to direct California to retry petitioner under a system that does not arbitrarily divide defendants into two groups, one of which is denied pretrial discovery. There are many ways in which California could cure the existing inequality, and which

to select is up to her Supreme Court or Legislature if this Court's decision rests on the equal protection clause. The State could (1) permit an accused to appear with counsel before the grand jury and cross examine witnesses; (2) hold a preliminary hearing after indictment; (3) permit the defendant to schedule depositions of key prosecution witnesses after indictment; (4) abolish presentment by indictment as a means of instituting criminal prosecutions; (5) eliminate the right to cross examine witnesses at the preliminary hearing now accorded persons prosecuted by information.[13]

A grant of certiorari in this case will give California an opportunity to attempt to justify its discriminatory procedures. We are convinced it cannot do so, but whatever the decision an important precedent to guide the states will have been established.

B. *Precluding the Taking of Depositions Denies Due Process of Law in Contemporary American Practice Which Has Come to Rely so Heavily on Pretrial Discovery.*

Since ratification of the fourteenth amendment there has been a substantial change with respect to the importance in the American legal system of pretrial discovery tools such as depositions. The taking of depositions has become such a standard technique of trial preparation in civil litigation that the contemporary consensus surely is that to abolish this discovery device would be to deny a litigant a fair trial. Counsel who litigate mainly civil cases are shocked to be deprived of the deposition discovery device when called on to represent a criminal defendant, yet with liberty and not just property at stake due process standards of fairness must surely be as strict, if not more so, in

[13] Solution number five would perhaps run afoul of the due process clause, but it would end discrimination concerning pretrial examination of adverse witnesses.

the case of a criminal trial. Recognizing this, an increasing number of states are providing by statute, rule or otherwise for the taking of depositions in criminal matters. See J. DeMeo, California Deposition and Discovery Practice ¶ 16.03(2) (1971) (citing Oregon, Vermont, Ohio, Wisconsin, and Florida authority). For these reasons as well as those presented by Justice Mosk in *Johnson v. Superior Court, supra,* a question suitable for review on certiorari is raised by petitioner's claim that denial of her motion to take Nancy Muller's deposition violated the due process clause of the fourteenth amendment.

C. *The Fourteenth Amendment Violation Was Prejudicial*

The jury in this case had to believe petitioner or Nancy Muller, who testified as to purchasing heroin maps from petitioner. Although petitioner did present alibi witnesses, the jury obviously found Muller the more credible. As noted above, Muller testified at trial under a grant of immunity, and charges against Muller were kept pending until shortly after she testified and the jury convicted petitioner. Testifying under immunity, Muller was obviously under pressure to stick to her transcribed grand jury testimony that had been taken without being tested by cross-examination. The State but not petitioner had the chance to "pin down" Muller before trial. If defense counsel was to have a reasonable chance to break down Muller's story on cross-examination, this would have been at a pretrial deposition taken before Muller became cemented into her original accusations by the immunity grant at trial.

III. AT THE LEAST, THIS MATTER SHOULD BE HELD ON THE COURT'S DOCKET PENDING THE DECISION IN NO. 74-1646.

In *Andresen v. Maryland,* No. 74-1646, the Court has granted certiorari to consider the second question pre-

sented in the petition in that case, "Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?" Cert. petn. p. 3, No. 74-1646. The petition in that case makes five arguments as to why the fourth amendment was violated, and that presented at pp. 29-30 of the petition there, based on *Aguilar v. Texas*, is similar to the fourth amendment contention raised in the instant case. Mr. Andresen contends that the affidavit for search warrant employed against him is insufficient because it is impossible to tell from it if allegedly corroborative sources were really, as claimed by the defendant, themselves criminal informants. The Maryland Court of Special Appeals held in *Andresen v. State*, 24 Md. App. 128, 331 A.2d 78, 107-108 (1975), that it was "persuaded" from certain descriptions in the affidavit that these sources were disinterested, noncriminal witnesses and not underworld informants whose own "tips" needed corroboration. Unless this Court rules favorably to Andresen on his other contentions that the fourth amendment was violated in his case, the Court will soon be writing again on the sufficiency-of-affidavit issue in Andresen's case. It is not unlikely that fresh guidelines will be developed which the California courts should apply to petitioner Splawn upon a remand in her case if certiorari is not granted to give plenary consideration to the issues raised in this petition.

CONCLUSION

For the foregoing reason, petition prays that a writ of certiorari issue to review the judgment of the California Court of Appeal for the Second Appellate District.

Respectfully submitted,

William A. Reppy, Jr.
Duke Law School
Durham, North Carolina 27706
counsel for petitioner

APPENDIX A

Affidavit of Officer Dunham

SUPERIOR COURT
COUNTY OF VENTURA
STATE OF CALIFORNIA

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT	COURT NO. CR 5330

I, CHARLES DUNHAM, being first duly sworn, state that there is now on the premises described as 1761 Ventura Boulevard, in the County of Ventura, California, further described as follows: It is a two story wood, single story residence, a photograph of which is attached to the search warrant supported by this affidavit, marked Exhibit "D", incorporated herein by reference. The house sits on the north side of Ventura Boulevard between Rose and Santa Clara Avenues, immediately east of the General Telephone building. It is the only residence between Rose and Santa Clara, on the north side of the freeway. Also included are the surrounding grounds, outbuildings and trash containers.

the following property which is: [property used to commit a felony] [property in possession of, or being concealed by, another with intent to commit a public offense] [property tending to show a felony was committed]

1) United States currency, denominations and serial numbers of which are attached to the search warrant supported by this affidavit, attached to it, marked as Exhibits "A" & "B" and incorporated

herein by reference as if set out in full at this point.

2) Hand-drawn maps of various streets of Oxnard, California, drawn on 3 ring binder papers, white with blue lines.

3) Utility bills, receipts, keys, or other papers tending to show Patty Vujovich owns, rents, resides at or otherwise controls the above described premises.

The facts establishing the foregoing grounds for issuance of a search warrant are as follows: Your affiant is a peace officer, employed by the Oxnard City Police Department. He had been so employed for 7½ years. He has been assigned to the narcotics detail for 6 months. He has been trained in the identification of heroin and the use of the Marquis Presumptive test. He has seen heroin in numerous formal training sessions and in-field situations. He is familiar with heroin and the Marquis Presumptive test.

On March 20, 1974, your affiant met with a confidential informant (hereinafter referred to as CI). The CI is of unknown, untested reliability. The CI is presently awaiting sentencing on a petty theft conviction and is facing violation of probation proceedings on another misdemeanor conviction. No promises have been made therein.

On March 20, 1974, the CI was searched by Detective Byers, known by your affiant to be a peace officer. No contraband was found. A radio transmitter was attached to the CI's body. Your affiant searched the CI's car, finding no contraband. The CI then drove to the residence at 214 Smith Street, Oxnard. Prior to going to that location, the CI placed a recorded telephone call to Nancy Muller

who agreed to meet the CI. Your affiant has listened to the tape recording of that call.

Your affiant followed the CI to 214 Smith Street. The CI made no stops and did not leave the car. Upon arriving at 214 Smith Street, the CI met with Nancy Muller. The CI gave Nancy Muller $225 in recorded funds, given to her by your affiant. Dets Byers and Nishihara, personally known by your affiant to be a peace officer, recorded the serial numbers off the bills. A copy of that list is attached to the search warrant supported by this affidavit, marked Exhibit "A" and is incorporated herein by reference as if set out in full at this point. Your affiant monitored and recorded the conversation between Muller and the CI, as he had done with a conversation the preceeding day when Muller agreed to sell the CI heroin on March 20.

After receiving the money, Muller left the residence alone, entered her car and left the area. Detectives Mattioli, Warren and Maynard, personally known to your affiant to be peace officers followed Muller to the above described premises and have relayed to your affiant by personal conversation, official police reports and police radio that Muller drove directly to that location without making any stops or leaving the car. Although the officers did not see her enter the house, they saw her empty car in front of the house. The house is an isolated ranch house, with no other residences within hundreds of yards. She was not seen wandering about the grounds. Muller remained at the residence about one half hour. After leaving the residence she drove directly back to Smith Street, under constant surveillance of the above officers. She made no stops and did not leave the car. When she returned to the Smith Street area, Nancy

honked the horn. The CI left the residence and entered the car. The CI and Muller discussed a map Muller had obtained at the Ventura Boulevard address — which showed where the heroin was located.

Under the surveillance of your affiant and the above officers, Muller and the CI drove to the area of Navato and Wooley Roads, the area indicated in the map. A copy of that map is attached to this affidavit, marked Exhibit "C." At that location, the CI picked up a Salem cigarette package at the base of a fire hydrant. The CI and Muller then returned to Smith Street. The CI took the map and left the vehicle. The CI then entered the CI's vehicle, alone and left the area. Within minutes, the CI met with your affiant (having been under the constant surveillance of officers) and handed your affiant the Salem package.

Your affiant has examined the tan powder within the package and ran a Marquis Presumptive test on it. The test proved positive for the presence of heroin. Based on the test, his observations and training and experience, your affiant believes the powder contains heroin and is of that opinion.

On March 21, 1974, your affiant met with the same CI. The CI was searched and no contraband was found by Det. Byers. A radio transmitter was attached to the CI's body. Your affiant searched the CI's car, finding no contraband. Your affiant gave the CI $250 in U. S. Currency, the denominations and serial numbers of which are attached to the search warrant supported by this affidavit, marked Exhibit "B" and incorporated herein by reference as if set out in full at this point. The funds had been recorded by fellow peace officers.

The CI then placed recorded telephone calls to Nancy Muller. They agreed to meet; the CI to purchase heroin. Your affiant was present when the calls were made.

The CI drove, under the surveillance of your affiant and fellow peace officers named above, to the Smith address. There, the CI met Nancy Muller. The CI gave Muller $225 the above described money. Muller then left the area in her vehicle. Muller was surveiled by fellow officers Maynard, Mattieli, Scott, Boyce and Warren, among others. Muller drove directly to the Ventura Blvd. address. She did not stop nor leave her car until she arrived at the premises. She entered the premises at about 7:10 p.m. Again, no officer saw her enter the house, but there are no other residences in the area.

During conversations on March 20, 1974, between the CI and Nancy Muller, Muller indicated she was buying the heroin from a "Patty" on the above described premises. The CI has had prior dealings with Patty and knows her to be Patty Vujovich aka Splawn. Your affiant has had numerous contacts with fellow officers and from his knowledge and that information believes Patty Vujovich to reside at the above described premises.

Approximately 40 minutes later, Muller returned to her car and drove to meet the CI, waiting about two miles away. After a brief conversation, the CI and Muller left in their respective vehicles. They drove to the area of Wooly and Ontario Streets in Oxnard.

There, they got into Muller's car and drove to the area of Leeward and Victoria. There, both persons got out of the car. The CI found a Salem package, picked it up and both got back in the car.

They then returned to the area of Ontario and Wooly where they parted company. Muller was sub-

sequently arrested for sale of heroin.

The CI met with your affiant and gave him the package. Your affiant has examined the contents, ran a Marquis Presumptive test which proved positive for the presence of heroin. Your affiant is of the opinion the powder contains heroin.

The CI also gave your affiant a map given to her by Muller, which indicated the area of Leeward and Victoria. A copy of this map is attached to this affidavit, marked Exhibit "E." At all times mentioned above, the CI and Muller were under constant surveillance of your affiant and/or fellow officers. She (Muller) did not leave the car except as noted neither did she (Muller) enter any residence or other building.

The above activities concluded about 9:00 p.m. Since the above mentioned property to be seized is easily destroyed or removed from the premises and it is now past 10 p.m., your affiant requests this warrant be endorsed for night service. Your affiant believes the passage of time will allow the evidence to be destroyed or removed.

Wherefore your affiant prays a search warrant issue for the above premises for the above property.

DATED: March 21, 1974 /s/ Charles Dunham
(Affiant)

Subscribed and sworn to before me this 21st day day of March, 1974, at 11:10 o'clock p.m., in the County of Ventura, California.

/s/ Burt Ruffner
Judge of the Superior Court

APPENDIX B

* * * *

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, —vs— PATRICIA SUSANNE SPLAWN, Defendant and Appellant.	2d CRIM. No. 26021 (Ventura County Sup. Ct. No. 10498)

KAUS, P. J.

Defendant Patricia Splawn was convicted by a jury of conspiracy to sell heroin (count I), sale of heroin (counts II and III), and maintaining a place for the sale of heroin (count IV). She was sentenced to concurrent prison terms; sentence was stayed on counts I and IV.

On appeal she challenges: The sufficiency of a search warrant; the use of the grand jury; the denial of her motion for a change of venue, and various alleged errors occurring at the trial. The facts are stated in discussing these contentions.

DISCUSSION

1. *The Search Warrant*

A Ventura County police officer prepared the affidavit in support of the application for a search warrant of defendant's house seeking money, maps—the significance of which will become apparent—and papers to indicate that defendant owned or occupied the premises.

The officer met with an unknown, unreliable, confidential informant—who turned out to be Barbara Bird—on March 20, 1974. The informant and her car were searched by a police officer. No contraband was found. She was equipped with a radio transmitter. She had previously placed a recorded phone call to Nancy Muller who agreed to meet her.

Followed by the police, the informant drove to 214 Smith Street, where she met with Muller. She made no stops and did not leave the car. She gave Muller $225 in recorded funds. The conversation between the informant and Muller was monitored. Muller then left the residence alone and, followed by the police, drove to defendant's residence without making any stops or leaving the car. She was not seen entering the house which, however, is an isolated ranch house and she was not observed wandering around the grounds. Muller remained at the residence about a half hour and then drove directly back to Smith Street, under the constant surveillance of police officers. She made no stops and did not leave the car. When she returned to Smith Street the informant entered her car; the informant and Muller discussed a map which Muller had obtained from defendant's residence. The map showed where heroin was located.

Followed by the police, Muller and the informant drove to the area indicated on the map, where the informant picked up a Salem cigarette package. The informant and Muller then returned to Smith Street. The informant

took the map and the Salem package and left Muller's vehicle, entered her car and, still under constant surveillance by police officers, met with the officer and gave him the Salem package. Based on the officer's observations and a field test, the officer concluded that the powder contained heroin.

On March 21, the routine, described in detail in the affidavit, was repeated.

In the monitored conversations on March 20, Muller indicated that she was buying the heroin from a "Patty" at what was defendant's residence. The informant knew Patty to be defendant. The officer had information that defendant lived at the premises to be searched.

Defendant contends that the affidavit in support of the search warrant was legally insufficient. The contention is without merit. Defendant devotes some 35 pages to the adequacy of the affidavit. Boiled down defendant contends that Muller was an unknown, unreliable informant and her statements linking the narcotics to defendant were not adequately corroborated.

First, to the extent that corroboration was an issue, Muller was a participant in a crime and her statements were entitled to more weight than those of a mere tipster. (Cf. *People* v. *Christian,* 27 Cal.App.3d 554, 560.)

More to the point, the magistrate could properly have issued the warrant if Muller had said nothing and the warrant had been issued based on the officer's observations.

In determining the sufficiency of an affidavit in support of a search warrant, the standard is whether the facts contained in that affidavit are such as would lead a man of ordinary caution or prudence to believe and conscientiously to entertain a strong suspicion of the guilt of the defendant. (E.g., *Skelton* v. *Superior Court,* 1 Cal.3d 144, 150.) It is conceivable, as defendant appears to contend, that Muller had the map on her person all the time and that the visits

to defendant's residence were a mere ruse. However, the almost inescapable inference is that Muller, after having arranged to obtain heroin for the informant, went to defendant's residence to pay for the heroin and to obtain the map that would lead to it. At an absolute minimum, the inference was well within the ambit of a reasonable magistrate's conscientious belief.

2. *Grand Jury Indictment*

The search warrant was executed and defendant was arrested. After a felony complaint had been filed in the municipal court, but before the preliminary hearing, the grand jury on May 23, 1974, returned indictments against defendant.

Conceding that the People are entitled to proceed either by way of indictment or by way of information (e.g., *In re Terry*, 4 Cal.3d 911, 926), defendant nonetheless contends that once the People have decided to proceed by way of information, they are bound to follow through on that decision and the defendant has a vested right to a preliminary hearing.

The contention is without merit. Had the magistrate dismissed the complaint, the People would have been entitled to refile or to seek an indictment. (E.g., *People* v. *Uhlemann*, 9 Cal.3d 662, 666.) No reason appears why the People are not similarly entitled to abandon the information procedure and proceed by way of grand jury indictment. (*People* v. *Diaz*, 206 Cal.App.2d 651, 662.)

Defendant's reliance on cases in which the Legislature has improperly conditioned the exercise of judicial power on the consent of the prosecution is misplaced. (E.g., *Esteybar* v. *Municipal Court*, 5 Cal.3d 119, 125-127; *People* v. *Tenorio*, 3 Cal.3d 89, 94-95.) Since the People need not appear before a magistrate at all, it makes no difference at what point they choose not to present their case to a magistrate.

3. *Motion for Change of Venue*

Defendant contends that the trial court improperly denied her motion for a change of venue and that, because of extensive pretrial publicity, she did not receive a fair trial. The contention is without merit.

Defendant was arrested on March 22, 1974. The trial began on August 5. The basis for her motion for change of venue was the "multitude of newspaper articles" about defendant's arrest and the criminal activities of her brother, Frank Vujovich, who had recently been sent to prison.

Defendant relies on a collection of news clippings covering a period from December 1972 to July 20, 1974; a declaration by defendant stating that her milkman had stopped delivering milk because of the "publicity regarding my arrest," and a declaration by her father that his insurance agent told him that the company was cancelling defendant's insurance because of the "extensive publicity" concerning her arrest.

The declarations, assuming they were believed, do not amount to much. That persons who knew defendant paid attention to news about her does not mean that ordinary citizens in Ventura similarly paid attention to items about defendant's arrest.

Defendant's reference to "extensive and numerous newspaper articles" promises more than she delivers. Clippings from about 35 articles are included. About half of these dealt with Frank Vujovich, defendant's brother, who was variously charged with assault and probation violations, battery, brandishing a pistol, possession of a concealed weapon and felony manslaughter. The articles concerning defendant's activities cover a period from March 22, 1974, to July 20, 1974. She is referred to as "Splawn" or "Splawns"[1]—not "Vujovich." Excepting a photograph of

[1] Defendant's husband, James Splawn, was also arrested and charged, but apparently absented himself from the trial.

defendant which appeared on May 22—some ten weeks before the trial—the articles were straightforward factual statements. The only articles of interest were those involving Vujovich in which he and defendant were associated because he had been arrested on suspicion of threatening a witness in defendant's case. Assuming those articles were remembered, nothing any juror might have read could have compared to Nancy Muller's later testimony concerning the threats made by Vujovich and other family members.

The general rule is that a motion for change of venue must be granted whenever it is determined that because of the dissemination of potentially prejudicial material there is reasonable likelihood that a fair trial cannot be had otherwise. (E.g., *Maine* v. *Superior Court,* 68 Cal.2d 375, 383.) However, even assuming—which we do not—that defendant would have been entitled to a change of venue before trial, the standard on review is whether defendant was denied a fair and impartial trial within the meaning of Penal Code section 1033. (E.g., *People* v. *Sommerhalder,* 9 Cal.3d 290, 301.)

Nothing in this record indicates that any pretrial publicity affected the trial proceedings. To the contrary, few of the prospective jurors had heard of defendant or her brother.

Indeed, it is of some significance that counsel on appeal, who otherwise generously augmented the record, did not request that the record be augmented with jury voir dire. The Attorney General, however, did, and it turns out that at jury voir-dire defense counsel appeared unconcerned about the "prejudicial pretrial publicity" asserted so vigorously on appeal. In any event, the record indicates no complaint about the particular venire or jury chosen from that venire.

Moreover, we agree with the People that none of the

typical factors in a change of venue case were present here. The crime was not particularly vicious or savage. Ventura County has a substantial population. Defendant, rather than being an "outsider," was apparently a member of a prominent family and there was no particular victim with which the community would identify. (Compare: *People* v. *Tidwell,* 3 Cal.3d 62, 70; *Fain* v. *Superior Court,* 2 Cal.3d 46, 51-52; *Maine* v. *Superior Court, supra,* 68 Cal.2d 375, 385.) In conclusion, the trial court did not err in denying defendant's motion for change of venue.

4. *Trial on the Merits*
Facts

Barbara Bird, a heroin addict—and the confidential informant in the warrant discussed above—was arrested by the Oxnard City police and agreed to assist the police in arresting persons selling heroin in Ventura County. Bird knew defendant and had purchased heroin from her in the past. On March 19, after being equipped with a radio transmitter, Bird went to the Smith Street address to see Nancy Muller, through whom she knew she could obtain heroin. She had bought heroin from Muller many times previously. She asked Muller to buy some heroin for her and Muller agreed to do so the next day.

On March 20, a female police officer performed a skin search of Bird and another officer searched her automobile. Neither search turned up any money or drugs. A radio transmitter was then concealed under Bird's clothes and she was given $250 in currency, the serial numbers of which had been recorded by the police. Bird then drove under police surveillance to Smith Street and asked Muller to obtain a "half a piece of heroin"—a half ounce—for her. She gave Muller $225 of the $250 given her by the police.

Muller was a heroin addict and had known defendant for about two years. She had frequently purchased heroin

from defendant and had also operated as a runner for her. On March 20, Muller, who had no heroin in her possession at the time, drove to defendant's residence, while Bird remained behind at Smith Street. Muller was followed by various police officers in unmarked police cars and by a police helicopter. When she arrived at defendant's residence, she spoke to defendant and defendant's husband, James Splawn. (See fn. 1.)

Muller testified that defendant had been using a map system of selling and distributing heroin for about a year. Sometimes defendant sold the maps directly and sometimes directed Muller to other persons or other locations where a map would be found.

On March 20, Muller told defendant and her husband that she wanted a "map" and in exchange for the $225 defendant gave her a hand-drawn map. Muller then returned to Smith Street again under police surveillance. Bird entered Muller's car and they followed the directions on the map to a location where Bird picked up a crumpled cigarette package. The women returned to Smith Street and Bird drove away in her automobile. She was stopped by a police officer and gave him the cigarette package, which contained a toy balloon filled with a tan powder, and also gave the officer the hand-drawn map and the extra $25 which she had not given to Muller. The powder, which weighed 12.48 grams, turned out to be 10 percent heroin. Bird was then returned to police headquarters where both her car and her person were again searched and no other money or drugs were found.

The next day, Bird again called Muller from the police station and asked her if she could "come over"—street jargon meaning to make a narcotic purchase. Muller refused because she had noticed a police helicopter following her the day before; she told Bird to call her back in an hour which Bird did. Muller then called defendant and

asked defendant's husband if she could "come over" and he said to "come on over." Muller called back Bird and told her to "come over" to Smith Street.

The ritual of the day before was repeated: Bird's person and car were searched; no contraband or money was found; Bird was given marked currency; she was wired for sound; she drove to the Smith Street residence under police surveillance and asked Muller for another half a piece of heroin, and gave Muller $225.

This time, Muller told Bird to follow behind her in her own vehicle to a certain location and to wait there until she got back from defendant's home. Bird waited; Muller continued on to defendant's residence unaware that she was again under police surveillance from both the ground and air.

Muller gave defendant's husband the $225 and defendant gave her a hand-drawn map. Muller had difficulty understanding this map and defendant told her how to follow it and where to find the heroin. Under police surveillance, Muller returned to the location where Bird had been waiting for her. Bird again followed Muller in her car and then Bird got into Muller's car and they followed the hand-drawn map to a location where Bird found another cigarette package containing a toy balloon. Bird gave Muller a pinch of the heroin powder which was in the toy balloon. After Muller left Bird at her car, Bird was again stopped by police officers. She turned over the cigarette package containing the heroin and the hand-drawn map. Later chemical analysis of this balloon revealed a tan powder weighing 11.55 grams and containing 10 percent heroin. Again Bird and her automobile were searched and no money or contraband was found.

Meantime, Muller was arrested by the police. On March 22, the warrant discussed above was executed. The police discovered an envelope containing three hand-drawn

maps similar to those which Muller had previously obtained at defendant's residence. Police officers followed the directions on the maps to locations and found three cigarette packages containing three balloons filled with heroin. The powder in the cigarette packages weighed 12.77 grams, 14.24 grams and 25.05 grams, respectively, and each contained 10 or 11 percent heroin.

Several other items were found in defendant's residence: a blue balloon containing cocaine, weighing 14.47 grams; a three-ring-binder-type notebook containing notations in defendant's handwriting pertaining to narcotics transactions; numerous colored balloons in a paper bag, a funnel, a strainer, and a scale; a box filled with numerous empty cigarette packages; a total of about $7,000 in cash, including marked currency.

The defense was chiefly directed at impeaching the testimony of Nancy Muller. Besides, defendant denied any involvement in any narcotics transactions with Nancy Muller; testified that she was the beneficiary of a $307,000 trust fund and generally attempted to provide an innocent explanation for the apparently incriminating items found in her home.

a. *Extra Judicial Statements of Witnesses*

Muller testified on cross-examination that from April 1972 through March 21, 1974, she purchased heroin from defendant an average of once a day, seven days a week. She testified that over the years she had bought heroin from other people "about four or five regularly," and that "for a while I was buying from Abel Bautista." She testified that for about a month she did not buy heroin from defendant.

It was defendant's theory that about March 20 and March 21, when Muller was allegedly buying heroin from defendant, she had, in fact obtained the heroin from

another source and had drawn her own maps and established her own caches of heroin. The defense called two witnesses, David and Becky Lukens, to testify in support of this theory, but each declined to answer questions on grounds of self-incrimination. They did, however, testify that they had been interviewed by a defense investigator. Defense counsel then made an offer of proof to the effect that the defense investigator would testify that the Lukens had told him that Muller had sold heroin to them and that on 10 to 15 occasions, both before and after the sales involved in defendant's prosecution, one or both of them had gone with Muller to the place where she had obtained her heroin, not defendant's residence, and that the person involved was not defendant. The trial court sustained the prosecutor's objection and excluded the evidence under Evidence Code, section 352.

Contrary to defendant's contention, the trial court properly exercised its discretion to exclude the proffered testimony under section 352. The court pointed out that since Muller had testified that she had purchased heroin from other persons, testimony that she had sold heroin to the Lukens or obtained it from a source other than defendant, would not undermine her testimony that on March 20 and March 21 she had obtained the maps that led to the heroin caches from defendant.

Given the limited probative value of the investigator's testimony concerning the statements made by the Lukens concerning transactions with Muller, the trial court properly excluded the evidence.[2]

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[2] *People* v. *Spriggs*, 60 Cal.2d 868, 876, and *People* v. *Smith*, 13 Cal.App.3d 897, 902-903, relied on by defendant, do not apply since in both cases the statements offered were those of third parties admitting culpability for the offense charged, and thus the excluded evidence went to the heart of the case. Moreover, in *Smith* the offer of proof was held to be properly refused under the circumstances. (13 Cal.App.3d at p. 904.)

b. *Deposition of Witness*

Defendant's pretrial motion for an order authorizing defendant to take the deposition of Nancy Muller was denied. Defendant contends that, particularly because the People proceeded by way of grand jury indictment and therefore there was no opportunity to cross-examine Muller at a preliminary hearing, she had a right to take Muller's deposition. We disagree.

The California Constitution, article 1, section 15, now[3] authorizes the taking of witnesses' depositions in criminal cases if the Legislature so provides. It has not done so in these circumstances. (See Pen. Code, §§ 1335-1362.) In California the right to a deposition in criminal cases is governed by our constitutional and statutory provisions. (E.g., *People* v. *Bowen*, 22 Cal.App.3d 267, 278.)

Pitchess v. *Superior Court*, 11 Cal.3d 531, relied on by defendant, does not apply. In *Pitchess*, the court restated the rule that a criminal defendant's "motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand. [Citations.] Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonable accessible information. [Citations.]

"In accordance with these principles, it has long been held that civil discovery procedure has no relevance to criminal prosecutions. [Citations.]" (11 Cal.3d at pp. 535-536.)

Thus, defendant has no particular right to take the deposition of any witness, notwithstanding Code of Civil

[3] The California Constitution formerly allowed depositions in a criminal case where "there is reason to believe that the witness from inability or other cause, will not attend at the trial," if the Legislature so provided. (Former Art. 1, § 13.)

Procedure, section 2016. And, contrary to the situation in *Pitchess* where defendant sought to discover otherwise unavailable *information* essential to his defense (11 Cal.3d at pp. 537-538). here defendant knew from Muller's grand jury testimony what the substance of Muller's evidence against her would be.

The trial court properly refused to allow defendant to take Muller's deposition.

c. *Tainted Testimony*

Nancy Muller testified at the grand jury proceedings, and at trial, under a grant of immunity. Defendant contends that Muller was forced to testify because of the grant of immunity and therefore defendant was denied a fair trial. The contention is without merit. No conditions were imposed upon the grant of immunity to Muller; unlike the witness in *People* v. *Medina*, 41 Cal.App.3d 438, 455-456, she was not required to testify in accordance with an earlier version of events told to the authorities.

In her reply brief, defendant, citing *People* v. *Ruthford*, 14 Cal.3d 399, contends that the prosecution suppressed "material evidence favorable to an accused . . . [which] bears on the credibility of a material witness" (*Ruthford, supra*, at p. 406), when it failed to disclose the express or implied agreement which resulted in the case against Nancy Muller being dismissed the day after defendant's trial.[4] This suppression, defendant contends, was prejudicial, since defendant could not effectively show that Muller had a special motive for lying: dismissal of the charges.

Defendant's case has little to do with *Ruthford*. There, the prosecutor "not only failed to disclose details of the

[4] We granted defendant's motion to augment the record with the clerk's transcript of the proceedings pending against Muller. (*People* v. *Muller*, Ventura County Municipal Court, FYO 1641.)

inducement for [the witness'] testimony, but also forestalled further inquiry by affirmatively representing to the court that no promises had been made to [the witness]." (14 Cal.3d at pp. 409-410.) Here, defendant knew all along that Muller had been granted immunity under Penal Code section 1324 which, by the express terms of the statute, is transactional. (*Nelson* v. *Municipal Court,* 28 Cal.App.3d 889, 892.) That the charges had not actually been dismissed certainly was not "substantial material evidence . . . ."

Moreover, defendant knew, no later than the time that the People called Muller as a witness, that the charges had not been dismissed. When Muller was called to testify, the prosecutor asked her: "What were you charged with?" She answered: "Sales of heroin." "How many counts?" "Two." "*To your knowledge is that case still pending*?" Muller: "*Yes.*" Defense counsel vigorously attempted to impeach Muller on cross-examination, yet did not question Muller further concerning the pending charges. At no time did defense counsel express surprise, and notwithstanding a plethora of motions, at no time raised the issue of Muller's impending charges.

Assuming that the People should have fully disclosed that although Muller had been granted immunity, the charges had not been dismissed, defendant was beyond a reasonable doubt not prejudiced.[5]

d. *Prosecutorial Misconduct*

Under the rubric of prosecutorial misconduct defendant contends that the "prosecutor knowingly produced before the jury false and inaccurate laboratory reports,

[5] Although the court denied defendant's discovery motion for Muller's arrest record, defense counsel's lack of response to the news that the charges were still pending indicates that defense counsel either knew or did not care.

. . ." The factual basis of defendant's contention is incorrect; the legal conclusion that she had been denied a fair trial is untenable.

What happened was this: As his last witness, the prosecutor called Norma Fort, a criminalist. She testified to the respective weights of the substances in the various exhibits and to the fact that they were narcotics—one cocaine, all the others heroin. She did not testify to the results of any quantitative analyses, that is to say, the percentage concentration of narcotics. On cross-examination, she admitted that a gas chromatograph machine, used to make one of three separate laboratory tests—primarily for quantitative analyses—was discovered to have been malfunctioning during the last week of April 1974 and might have been malfunctioning on April 17, when her analyses pertaining to this case were made. After the prosecutor established, on redirect examination, that she had not purported to testify to the result of any test made with the suspect machine, he rested.

Defense counsel then moved for a judgment of acquittal under section 1118.1 of the Penal Code—discussed below—and for dismissal on general due process grounds on the basis that the prosecutor had known about the breakdown of the chromatograph machine before calling the criminalist as a witness, and had not informed defense counsel of what, counsel submitted, was a fatal flaw in her testimony. Counsel claimed to have learned of the machine's April breakdown more or less by accident at some point before his cross-examination of the witness. The prosecutor conceded that he had known generally about the April breakdown of the machine, but had only learned just before the criminalist went on the stand that the exhibits involved in this case were suspect. He, therefore, did not ask her any questions that called for a quantitative analysis.

Defendant's assertion of misconduct is grossly exaggerated. True, the prosecutor might have informed defense counsel as soon as he learned that one of the machines used for analyzing heroin might have been defective. There was, however, evidence that two other tests proved the powder to be heroin, and the People were not required to put on any other evidence containing the purity of the substance.

Defendant's companion contention that the trial court should have granted defendant's motion for a judgment of acquittal under Penal Code section 1118.1 is equally without merit. Defendant relies on the rule that useless traces of residue of a narcotics substance are not sufficient to sustain a conviction for either possession of narcotics or possession of narcotics for sale. (E.g., *People* v. *Leal*, 64 Cal.2d 504, 512; *People* v. *Gossett*, 20 Cal.App.3d 230, 234.)

The statutory scheme requires that the People prove that the substance has a "potentiality for future use or sale"—a question of fact. (*People* v. *Leal, supra,* 64 Cal.2d 504, 512.) In this case the powder in the balloons totalled 76 grams, ranging each in weight from 11.55 grams to 25.05 grams. The weight of the substance combined solely with testimony that the substance did contain some heroin would without more have supported defendant's conviction. (*People* v. *Harris*, 15 Cal.App.3d 498, 501-502.) Certainly the failure of the prosecution at that point to quantify the amount of heroin did not justify the granting of defendant's motion under section 1118.1.[6]

[6] After defendant's motion was made and denied, the People recalled the criminalist, who testified to the heroin concentrations of at least 10 percent, previously noted in this opinion.

CONCLUSION

Defendant's final contention that the cumulative effect of many errors resulted in an unfair trial proceeds from the erroneous assumption that there were errors in the trial worth discussing. There were none.

The judgment is affirmed.

NOT FOR PUBLICATION

KAUS, P. J.

We concur:

STEPHENS, J.
HASTINGS, J.